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December 19, 1994

BY HAND

William F. Caton,
Acting Secretary,
Federal Communications Commission,
1919 M Street, N.W., Room 222,
Washington, D.C. 20554.

Re: PP Docket No. 93-253
Implementation of Section 309(j) of the
Communications Act - Competitive Bidding

Dear Mr. Caton:

Submitted herewith on behalf of NationsBank are an original and eleven copies of its Petition for Limited Reconsideration of the Fifth Memorandum Opinion and Order in the above-captioned matter.

Please contact Ari Fitzgerald at (202) 956-7565 concerning this submission.

Respectfully submitted,

Patricia Diaz Dennis
Ari Q. Fitzgerald

Attorneys for NationsBank

(Enclosures)

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding	)	

PETITION FOR LIMITED RECONSIDERATION OF THE FIFTH MEMORANDUM OPINION AND ORDER

NationsBank

Patricia Diaz Dennis, Esq.
Ari Q. Fitzgerald, Esq.

Attorneys for NationsBank

December 19, 1994

SUMMARY

NationsBank petitions, pursuant to Rule 1.429 of the Rules of the Federal Communications Commission ("FCC" or "Commission"), for limited reconsideration of the Fifth Memorandum Opinion and Order, PP Docket No. 93-253, FCC 94-285 (released November 23, 1994) ("Fifth Memorandum Opinion and Order"). NationsBank is a full service commercial bank ("bank") that operates, through 1800 branches, in 11 states and the District of Columbia. As of December 31, 1993, it was the third largest bank in the country measured by assets. NationsBank hopes to provide working capital and project financing to designated entities that successfully bid in the entrepreneur's block auctions.

To encourage banks to finance designated entities, NationsBank respectfully requests that the Commission modify or supplement its broadband PCS auction rules as follows:

1. Establish a procedure for increasing the number of entities to which entrepreneurs' block licenses in "financial distress" can be voluntarily transferred during the first five years of the license term. Under the procedure, entities that do not qualify as entrepreneurial businesses would be permitted to purchase the licenses only after eligible entrepreneurial businesses had been afforded 180 days to bid on them.

2. Clarify that the FCC will not cancel the licenses of entrepreneurial licensees that default on their installment payments but will, instead, allow the licenses

to remain part of the assets to be sold, subject to FCC approval, in a reorganization or workout consistent with the procedures summarized above.

3. Clarify that the United States will enter into intercreditor agreements with creditors of licensees and will assert no rights with respect to licensees' assets that are superior to those of other senior lenders.

DISCUSSION

I. DESIGNATED ENTITIES MUST ACCESS BANK LOANS TO BECOME VIABLE PCS BUSINESSES

As the Commission acknowledged in the Fifth Report and Order, PP Docket No. 93-253, FCC 94-178 (released July 15, 1994) ("Fifth Report and Order"), lack of access to capital is "the major problem facing minorities and women desiring to offer PCS." Fifth Report and Order at ¶ 96. To assist designated entities in attracting capital, the Commission has created and refined incentives for passive equity investment in designated entities and established an installment payment scheme to finance license purchases. Fifth Report and Order at ¶¶ 113-147; Fifth Memorandum Opinion and Order at ¶¶ 101-104.

While these incentives and others will bolster designated entities' participation in the PCS auctions, designated entities must also have access to bank loans to become viable, long-term owners of PCS businesses.* The current auction rules discourage bank lending by preventing banks from adequately protecting their loans.

Without the auction rule modifications discussed below, banks will either be reluctant to lend to designated entities or will lend to them only at high rates, forcing designated entities to rely disproportionately on high-cost equity financing during the critical, initial years of business. As a result, designated entities' costs of funds will far exceed their competitors' costs, placing them at a competitive disadvantage. Even at higher rates, the financing available to designated entities may not be sufficient to pay for system build-out. Standard & Poors recently analyzed broadband PCS and estimated that building their networks could cost PCS licensees "as much if not more than initial [license] payment." Communications Daily, December 2, 1994, at 2.

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* In documenting the problems designated entities traditionally encounter accessing capital, the Commission has focused extensively on bank loans. Citing recent testimony presented before the House Minority Enterprise Subcommittee, the FCC stated that African-American business borrowers, for example, "have difficulty raising [bank] capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources, such as affluent family or friends." Fifth Report and Order at ¶ 100.

II. THE FCC SHOULD MODIFY OR SUPPLEMENT THE CURRENT AUCTION RULES SO BANKS MAY MAKE LOANS TO DESIGNATED ENTITIES

To encourage banks to lend to designated entities, the Commission must allow them to protect, and reduce the risks associated with, their loans. Designated entities would be better able to secure bank financing if the Commission were to: (1) establish a procedure, applicable during the first five years of the license term, for enlarging the number of potentially qualified buyers of entrepreneurs' block licenses in "financial distress"; (2) clarify that it will not cancel the licenses of licensees that default on their installment payments so that the licenses may be sold, subject to FCC approval, in a reorganization or workout along with the debtors' other assets; and (3) clarify that the government will enter into intercreditor agreements with the creditors of licensees and will assert no rights with respect to licensees' assets that are superior to the rights of other senior lenders.

A. The FCC Must Create An Exception to Its Limited Transfer Rules to Allow Entrepreneurs' Block Licensees in Financial Distress to Sell Their Licenses to Entities That Do Not Qualify for the Entrepreneurs' Blocks

Commission rules currently limit voluntary transfers of entrepreneurs' block licenses during the first five years of the license term to entities that are qualified to bid in the entrepreneurial blocks. 47 C.F.R. § 24.839; Fifth Memorandum Opinion and Order at ¶¶ 134-135.

This restriction effectively reduces the value of licenses designated entities will hold by narrowing the potential market for those licenses.

While some license transfer restrictions are necessary to avoid unjust enrichment and ensure that designated entities remain in the PCS industry long-term, they should be flexible enough to accommodate banks' concerns about recovering their loans. Lending to designated entities will be unusually risky.* Many PCS licensees are likely to fail. Accordingly, the Commission should develop a scheme for enlarging the pool of potential buyers of entrepreneurs' block licenses, in financial distress situations, so that banks can better manage the risks associated with lending to designated entities.

An exception to the Commission's limited transfer rule is needed to permit pre-bankruptcy workouts as well as reorganizations in bankruptcy. In fact, the need for the exception may be more important in the pre-bankruptcy scenario because the probability that a successful

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* The extraordinary risks associated with lending to PCS providers in general and designated entities in particular are well-known. No history of industry performance exists for banks to assess in making loans. Most designated entities have little experience owning commercial mobile radio service ("CMRS") providers. See Fifth Report and Order at ¶ 107, citing Testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, before the House Minority Enterprise Subcommittee, May 20, 1994. Moreover, designated entities will have to compete against incumbent cellular operators and deep-pocket PCS providers in providing services.

restructuring will protect a bank's interests is much greater. A licensee will be more financially viable at that time, and the legal, financial and administrative constraints of a bankruptcy may prevent a bank from restructuring its loan in a manner which adequately protects its interests.

Typically, bank loans provide for "events of default", after the occurrence of which the bank is entitled to accelerate the loan and may force the borrower to restructure (either in bankruptcy or through voluntary reorganization or workout).* Banks generally view the occurrence of an event of default as a reliable indicator that a borrower is in financial distress and needs to take action to improve its financial position, such as a sale of a portion of its business to reduce its debt.

The proposed financial distress sale procedure would permit a voluntary license transfer during the first five years of the license term if a "financial distress" event occurs. A financial distress event would occur upon an event of default which gives the lending bank the right to accelerate its loan to the licensee. The license would initially be offered only to entities that qualify as entrepreneurial businesses. If, after 180 days, no

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* Typical defaults include the failure to pay interest or principal when due, the occurrence of certain bankruptcy or insolvency events, a violation of financial covenants and default with respect to other significant debt.

legitimate offer were made that would result in remedying all defaults or repaying the defaulted debt, the license could be transferred to entities that do not qualify as entrepreneurial businesses.

The Commission could effect this procedure by adding a subparagraph (5) to 47 C.F.R. § 24.839(d). Subparagraph (5) would except from the requirement that an entrepreneurs' block license be transferred only to another entrepreneurial business during the five-year holding and limited transfer period, a sale where (i) a "financial distress event" occurs with respect to the license owner, (ii) the license is first offered only to entrepreneurial businesses for 180 days and (iii) the offer does not result in a significant transaction that remedies all defaults or provides for the repayment of the defaulted debt. A financial distress event would occur upon the occurrence of an event of default which gives the lending bank the right to accelerate its loan to the licensee.

B. The Commission Should Clarify That It Will Not Cancel Licenses Owned By Entities That Default On Their Installment Payments

The Commission has stated that it may cancel the licenses of entities that default on their installment payments. Fifth Memorandum Opinion and Order at ¶ 131, quoting, Second Report and Order, PP Docket No. 93-253, FCC 94-61 (released April 20, 1994) at ¶ 240. This statement creates uncertainty about whether, in financial distress situations, designated entities will be able to retain anything of value that creditors could sell to recover their loans. If the FCC clarifies that it will not cancel the licenses of entities that default on their installment payments but will, instead, allow these valuable assets to be sold in a reorganization or workout, banks would be more certain about the possibility of recovering their loans through the sale of a designated entity's assets.

Eliminating the Commission's ability to cancel the licenses of licensees that default on their installment payments would affect the remedies available to the Commission solely in its capacity as a creditor of the licensee; it would not affect the Commission's ability, in its capacity as regulator, to cancel licenses for other regulatory violations. If, for example, a licensee failed to meet specified buildout requirements* or abused the FCC's entrepreneurs' blocks attribution rules,** the Commission would have the power to cancel its license.

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* See Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 94-144 (released June 13, 1994) ("Memorandum Opinion and Order") at ¶ 156, citing Second Report and Order, GEN Docket No. 90-314, FCC 93-451 (released October 22, 1993) ("Second PCS Report and Order") at ¶¶ 133-134.

** See Fifth Report and Order at ¶ 168.

C. The Commission Should Enter Into Intercreditor Agreements

The Commission should enter into intercreditor agreements which clarify the relative rights held by licensees' creditors. Without this commitment, and the government's commitment to assert no rights with respect to the assets of licensees that are superior to those of other senior lenders, the government could assert that payment of overdue installment obligations take priority over obligations to private creditors such as banks. Given its ability, under current auction rules, to cancel licenses, the FCC will inhibit bank lending to designated entities if it refuses to clarify the rights the government will assert against a debtor and its other lenders in a reorganization, workout or bankruptcy. Entering into intercreditor agreements and clarifying the rights it will assert against licensees and their other creditors would remove uncertainty concerning these issues and improve the prospect that banks will lend to designated entities.

CONCLUSION

The broadband PCS auctions are an unprecedented opportunity to increase ownership within the telecommunications industry by those not historically represented. So that designated entities may take advantage of this opportunity, the FCC must address their lack of access to bank financing. The rule changes described in this petition will improve the likelihood that banks will lend to designated entities, making it more likely, in turn, that the FCC will realize the Congressionally-mandated goal that designated entities participate long-term in providing PCS.

Respectfully submitted,

NationsBank

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